1-17-2017

Taylor v. Riley Respondent's Brief 1 Dckt. 43686

IN THE SUPREME COURT OF THE STATE OF IDAHO

REED J. TAYLOR, an individual

Plaintiff-Appellant,

vs.

RICHARD A. RILEY, an individual; HAWLEY TROXELL ENNIS & HAWLEY, LLP, an Idaho limited liability partnership,

Defendants/Respondents,

and

SHARON CUMMINGS, Personal Representative of the Estate of Robert M. Turnbow; and EBERLE BERLIN KADING TURNBOW & MCKLVEEN, CHTD., an Idaho Corporation,

Defendants.

Supreme Court Docket No. 43686-2015

RESPONDENTS' BRIEF

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, In and for the County of Ada, Honorable Richard D. Greenwood, District Judge, Presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case.

This appeal arises out of a 1995 Opinion Letter addressed to Reed Taylor ("Taylor") regarding a Stock Redemption Agreement ("SRA") entered into with AIA Services Corporation ("AIA"). The Opinion Letter was issued by Eberle, Berlin, Kading, Turnbow & McKlveen, Chartered ("Eberle Berlin") as counsel for AIA and at AIA's request as required by the SRA drafted by Taylor's personal attorneys. Richard A. Riley ("Riley") and Robert M. Turnbow, attorneys at Eberle Berlin at the time, prepared the Opinion Letter. Hawley Troxell Ennis & Hawley ("Hawley Troxell") hired Riley years later.

While seeking to enforce the SRA in *Taylor v. AIA*, 151 Idaho 552, 261 P.3d 829 (2011) ("*Taylor v. AIA*"), Taylor turned his litigious gaze to Riley and Hawley Troxell and threatened suit based on the Opinion Letter. True to his threat he sued both. *See Taylor v. Babbitt*, 149 Idaho 826, 243 P.3d 642 (2010) ("*Taylor v. Babbitt*"). After he lost that lawsuit and attorney fees were awarded against him for bringing a frivolous action, Taylor brought the current lawsuit based on the same Opinion Letter seeking the same damages. Riley sought a Permissive Appeal from the district court's ruling that the malpractice/negligence claim against Riley was not barred by res judicata. This Court ruled that this claim was barred by res judicata because it was, or could have been, brought in *Taylor v. Babbitt*. *Taylor v. Riley*, 157 Idaho 323, 336 P.3d 256 (2014) (Permissive Appeal) ("*Taylor v. Riley*").

Taylor now appeals the district court's prior dismissal of his other claims against Riley for negligent misrepresentation, breach of fiduciary duty, and fraud and appeals the dismissal of

his vicarious liability claims against Hawley Troxell. Amazingly, Taylor also seeks to overturn this Court's decision in the Permissive Appeal that Taylor's negligence/malpractice claim against Riley was barred by res judicata. Taylor argues that none of his claims could have been brought in *Taylor v. Babbitt* because they were not yet ripe. Taylor also claims discovery of "facts," nearly 17 years after the Opinion Letter was issued, prevented him from bringing his fraud claim in prior litigation and that both Riley and Hawley Troxell breached a duty to disclose these "concealed" facts after the Opinion Letter was issued.

Riley and Hawley Troxell request this Court affirm the district court's dismissal of Taylor's lawsuit on the grounds: (1) that all claims were brought, or might have been brought, in prior litigation (*Taylor v. AIA* or *Taylor v. Babbitt)* and are barred by res judicata or collateral estoppel; and (2) regardless of the application of res judicata or collateral estoppel, each claim fails on the merits.

B. Course of Proceedings.

Taylor filed his current Complaint on October 1, 2009. R. 25-50. He alleged five claims against Riley: (1) Negligent Misrepresentation; (2) Negligence/Malpractice; (3) Idaho Consumer Protection Act violations; (4) Breach of Fiduciary Duty; and (5) Fraud and alleged vicarious liability against Hawley Troxell. *Id.* Riley and Hawley Troxell pled res judicata. R. 64; 65.

On April 21, 2010, Motions for Summary Judgment were granted in favor of all Defendants dismissing the Negligent Misrepresentation and Idaho Consumer Protection Act

claims.[1] R. 1674. On May 10, 2010, Taylor's remaining claims against Hawley Troxell were dismissed and Taylor's Breach of Fiduciary Duty claim against all Defendants was dismissed. *Id.* On April 5, 2012, the Fraud claim against Riley was dismissed. R. 1766. On October 24, 2012, the district court issued an Opinion and Order denying Riley's Motion for Summary Judgment seeking dismissal of the single remaining claim – Malpractice/ Negligence. R. 2556.

On January 17, 2013, this Court granted Riley's Motion for Permission to Appeal the district court's dismissal of Negligence/Malpractice. The Notice of Appeal was filed on February 6, 2013. On August 27, 2014, this Court reversed the district court's denial of Riley's motion to dismiss the Negligence/Malpractice cause of action:

> Mr. Taylor's claims in this lawsuit against Mr. Riley are barred by the judgment entered in favor of Mr. Riley in *Taylor v. Babbitt*. The district court erred in denying Mr. Riley's motion to dismiss based upon the doctrine of res judicata.
> . . .

Taylor v. Riley, 157 Idaho at 335, 336 P.3d at 268.

Following remand, the district court entered Final Amended Judgments in favor of Riley and Hawley Troxell. R. 6313-6321. On October 23, 2015, Taylor moved to reconsider the district court's prior dismissal of his claims against Riley and Hawley Troxell. R. 6322-24. The district court denied Taylor's Motion for Reconsideration. R. 6485-86. On October 29, 2015, Taylor filed the current Notice of Appeal.

[1] Taylor has not appealed the dismissal of his Idaho Consumer Protection Act claim.

C. Concise Statement of Facts.

The background and relevant facts have been examined and extensively discussed in the three prior appeals arising out of the SRA and Opinion Letter. *See Taylor v. AIA, Taylor v. Babbitt*, and *Taylor v. Riley* (Permissive Appeal). The following are pertinent excerpts from this Court's prior recitation of facts (enclosed by quotation marks), plus additional facts pertinent to this fourth appeal.

1. Facts Relevant to the 1995 Stock Redemption Agreement.

"Reed Taylor is the founder of AIA Insurance, an insurance agency based in Lewiston, Idaho, which sells insurance products to farmers and members of various agricultural growers associations. Reed Taylor was the majority shareholder of AIA Services, a holding company which has wholly-owned AIA Insurance at all times relevant to this lawsuit. In 1995, he held 63 percent of approximately 973,000 outstanding shares of AIA Services common stock and served as the Chairman of the Board of Directors and the Chief Executive Officer of AIA Services." *Taylor v. AIA*, 151 Idaho at 556, 261 P.3d at 833.

"On July 12, 1995, AIA Services Corporation (AIA Services) entered into a Stock Redemption Agreement with Appellant Reed Taylor to purchase all of his shares (613,494 shares) in AIA Services for a $1.5 million down payment promissory note, a $6 million promissory note and other consideration. . . . AIA Services failed to pay a $1.5 million note issued to Reed Taylor under the Stock Redemption Agreement when it became due on October 20, 1995. Reed Taylor and AIA Services agreed to modify the Stock Redemption Agreement

and entered into the Stock Redemption Restructure Agreement, but thereafter, AIA Services failed to make certain payments that had become due under the new terms." *Id.*

2. Facts Relevant to the 1995 Opinion Letter.

On August 15, 1995, Eberle Berlin issued an Opinion Letter at the request of its corporate client, AIA. R. 563. Riley and Turnbow participated in the preparation of the Opinion Letter. *Id.* Taylor was the recipient of the Opinion Letter. *Id.* Neither Eberle Berlin nor Riley represented Taylor in the SRA or for purposes of the Opinion Letter. Taylor was represented by separate counsel.[2]

3. Facts Relevant to the 2007 *Taylor v. AIA* Lawsuit.

"On January 29, 2007, Reed Taylor filed suit against AIA Services, AIA Insurance and John Taylor, seeking to recover the amounts owed on the two promissory notes." *Taylor v. AIA*, 151 Idaho at 556, 261 P.3d at 833. R. 2388-2433.

"In April, 2008, Respondents [AIA] filed a motion for partial summary judgment concerning the legality of the Stock Redemption Agreement, arguing that when the agreement was entered into, it violated the then-existing Idaho Code § 30-1-6, which authorizes corporations to redeem their shares but places restrictions on the source of funds used to redeem shares. The district court granted partial summary judgment in favor of Respondents in its Opinion and Order dated June 17, 2009. . . ." and found the SRA illegal. *Id.*, 151 Idaho at 558,

[2] Taylor's attorney at the time was Scott Bell, an attorney with a Seattle, Washington firm. R. 563-564; Tr., Vol. 1, p. 70, ll. 14-17. Taylor filed yet another lawsuit, this time against his own attorney, Mr. Bell and his law firm, for alleged malpractice in representing Taylor in relation to the SRA and Opinion Letter. Tr., Vol. II, p. 56, ll. 3-7; R. 1832.

261 P.3d at 835. This Court affirmed the district court's finding that the SRA was illegal and unenforceable. *Id.*, 151 Idaho at 574-575, 261 P.3d at 851-852.

4. Facts Relevant to 2008 *Taylor v. Babbitt* Lawsuit.

"On August 18, 2008, after the Underlying Case [*Taylor v. AIA*] had been through 21 months of motions and hearings . . . Reed filed . . . actions . . . against Babbitt, Ashby, Patrick Collins, Richard Riley, HTEH, and other unspecified attorneys who worked for HTEH based on its representation of the AIA Entities . . . . Reed asserted claims against Respondents [Riley, et al.] for: . . . breach of fiduciary duties." *Taylor v. Babbitt*, 149 Idaho at 831, 243 P.3d at 647. R. 620-645.

On October 15, 2008, Taylor moved to amend his complaint in response to a motion to dismiss his original complaint for failure to state a claim. R. 669. In support of his motion he added numerous allegations relating to the Opinion Letter, including that Riley breached duties owed to Taylor by and through the Opinion Letter which allegedly invoked Riley's personal liability. R. 676-77; 697; 704-10; 713. Final judgments dismissing all claims against Riley and Hawley Troxell were entered March 24, 2010. *Taylor v. Babbitt*, 142 Idaho at 831, 243 P.3d at 647.

5. Facts Relevant to 2009 *Taylor v. Riley* Lawsuit.

On October 1, 2009, while *Taylor v. Babbitt* was still pending, Taylor filed the present action, suing Riley and Hawley Troxell for a second time. R. 25. All of Taylor's present claims are based on duties allegedly owed to Taylor by and through the Opinion Letter. On Permissive

Appeal, this Court held that res judicata barred Taylor's negligence/malpractice claim against Riley. *Taylor v. Riley*, 157 Idaho at 335, 336 P.3d at 268.

II. ISSUES PRESENTED ON APPEAL

A. Whether res judicata and/or collateral estoppel bar all claims?

B. Regardless of the application of res judicata and/or collateral estoppel, whether each claim fails on its merits?

C. Whether the district court abused its discretion in determining the amount of the award of attorney fees to Riley and Hawley Troxell?

D. Whether Taylor is entitled to attorney fees incurred on appeal pursuant to Idaho Code § 12-120(3) or § 12-121?

E. Whether Riley and/or Hawley Troxell are entitled to attorney fees incurred on appeal pursuant to Idaho Code § 12-120(3) or § 12-121?

III. ATTORNEY FEES ON APPEAL

A. Riley and Hawley Troxell Are Entitled to Attorney Fees on Appeal.

This Court has held that the Opinion Letter qualifies as a commercial transaction and that Idaho Code § 12-120(3) applies, the district court properly awarded attorney fees, and awarded attorney fees on appeal. *Taylor v. Riley*, 157 Idaho at 339-340, 336 P.3d at 272-273. For the same reasons, if Riley and/or Hawley Troxell prevail on this appeal, they are entitled to attorney fees incurred on appeal pursuant to Idaho Code § 12-120(3).

B. Taylor is Not Entitled to Attorney Fees on Appeal Under Idaho Code § 12-121.

Taylor seeks attorney fees pursuant to Idaho Code § 12-121 under the newly amended Idaho Rule of Civil Procedure 54(e)(1) and the new standard set forth in *Hoffer v. Scott A. Shappard, D.O.*, 160 Idaho 830, 380 P. 3d 681 (2016). This Court ruled in *Hoffer* that because

Idaho Code § 12-121 did not contain the words "brought, pursued or defended frivolously, unreasonably or without foundation" that standard will no longer apply to whether attorney fees were owed under that statute. *Id.*[3] The new standard will allow attorney fees "when justice so requires." *Id.*

Idaho Code § 12-121 does not apply here. The application of Idaho Code § 12-121, even based on the new standard, is preempted by Idaho Code § 12-120(3) as a more specific statute. To the extent that attorney fees are awardable under Idaho Code § 12-120(3), this should be the exclusive remedy and should not be superseded by or combined with Idaho Code § 12-121.[4]

IV. ARGUMENT

A. Standards of Review.

1. Summary Judgment. On appeal from the grant of a motion for summary judgment, this Court utilizes the same standard of review used by the district court originally ruling on the motion. *Liberty Bankers Life Ins. Co. v. Witherspoon, Kelley, Davenport, and Toole*, 159 Idaho 679, 689, 365 P.3d 1033, 1039 (2016).

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[3] This Court determined that the new standard would not become effective until March 1, 2017 and will have only prospective effect, applied to all cases that have not become final as of that date. *Id.* It is unclear whether "final" means upon entry of a final judgment or after the last appeal. If the former, the new standard will not apply. If the latter, it will only apply if the appeal is decided after March 1, 2017.

[4] To the extent this Court determines that Idaho Code § 12-121 applies, Riley and Hawley Troxell request fees under that statute. If ever there was a case where justice so requires, it is this one. Taylor has harassed the parties through multiple lawsuits and appeals for over eight years.

2. **Motion to Reconsider.** When a district court decides a motion to reconsider, "the district court must apply the same standard of review that the court applied when deciding the original order that is being reconsidered." *Fragnella v. Petrovich*, 153 Idaho 266, 276, 281 P.3d 103, 113 (2012). When this Court reviews a trial court's decision to grant or deny a motion for reconsideration, it uses the same standard of review the lower court used in deciding the motion for reconsideration. *Liberty*, 159 Idaho at 686, 365 P.3d at 1040.

3. **Res Judicata.** Whether a prior adjudication bars a claim asserted in a subsequent lawsuit under the doctrine of res judicata is a question of law over which this Court exercises free review. *Taylor v. Riley*, 157 Idaho at 330, 336 P.3d at 263.

4. **Amount of Award of Attorney Fees.** "The district court's determination of a reasonable amount of attorney fees is a factual determination to which this Court applies an abuse of discretion standard of review." *Smith v. Mitton*, 140 Idaho 893, 902, 104 P.3d 367, 376 (2004).

B. Taylor is Barred from Relitigating All Claims by Res Judicata and/or Collateral Estoppel.

1. All Claims are Barred by the Final Judgment in *Taylor v. Babbitt* (Res Judicata).

This Court has already decided that Taylor's negligence/malpractice claim against Riley is barred by res judicata because it was or could have been brought in *Taylor v. Babbitt*. *Taylor v. Riley*, 157 Idaho at 335, 336 P.3d at 268. For the same reasons and based on the same analysis, Taylor's claims against Riley and Hawley Troxell for negligent misrepresentation, breach of fiduciary duty, fraud and vicarious liability are barred by res judicata.

"Res judicata prevents the same plaintiff from bringing multiple lawsuits against the same defendant for actions arising from the same event." *Hindmarsh v. Mock*, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002). Under principles of res judicata, a valid final judgment rendered on the merits by a court of competent jurisdiction is an absolute bar to a subsequent action between the same parties upon the same claim. *Id.*

This is the third lawsuit brought by Taylor and the fourth appeal arising out of the SRA and the Opinion Letter. Contrary to the fundamental purposes served by res judicata, by bringing the present lawsuit against the same parties and upon the same claims alleged in *Taylor v. Babbitt*, Taylor has refused to accept the adverse resolution of the prior judicial disputes (especially this Court's res judicata ruling in the Permissive Appeal), has advocated for the corrosive disrespect of these prior resolutions by seeking inconsistent results, has burdened the courts with repetitious litigation and has disregarded Riley's and Hawley Troxell's private interest in repose by harassing them with repetitive claims. *Aldape v. Akins*, 105 Idaho 254, 257, 668 P.2d 130, 133 (Ct. App. 1983).

Undissuaded by his loss in *Taylor v. Babbitt* and the award of attorney fees against him for bringing a frivolous lawsuit, Taylor filed the present lawsuit arising out of the SRA alleging wrongful conduct relating to the Opinion Letter and seeking the same damages. In the context of negligence/malpractice, this Court already told Taylor that both lawsuits arose out of the same transaction, both lawsuits alleged claims related to the Opinion Letter, and both sought to recover the same damages. *Taylor v. Riley*, 157 Idaho at 333, 336 P.3d at 266. Again undissuaded,

Taylor appeals the district court's dismissal of the remaining claims – claims involving the same parties, arising out of the same transaction and seeking the same damages.

Three elements are required for application of the doctrine of res judicata: (1) same parties; (2) same claims; and (3) final judgment. *Taylor v. Riley*, 157 Idaho at 331, 336 P.3d at 264. Like Taylor's negligence/malpractice claim, each element is also met with respect to the negligent misrepresentation, breach of fiduciary duty, fraud and vicarious liability claims dismissed by the district court.

a. The Same Parties Exist As to All of Taylor's Claims.

The doctrine of res judicata (claim preclusion) bars the presentation of a claim in a subsequent lawsuit between the same parties or their privies. *Taylor v. Riley*, 157 Idaho at 331, 336 P.3d at 264. This Court found that Riley was a defendant in both *Taylor v. Babbitt* and this action. *Id.* Hawley Troxell was also a defendant in both actions. R. 3594. The same party element applies equally to Taylor's claims for negligent misrepresentation, breach of fiduciary duty, fraud and vicarious liability. This element is met for all claims brought in this action.

b. Taylor's Present Claims Are the Same as Those Brought in the Prior Action.

(1) All Claims Arise Out of the Same Transaction.

The prior adjudication extinguishes all claims arising out of the same transaction or series of transactions. *Taylor v. Riley*, 157 Idaho at 331, 336 P.3d at 264. Simply stated, a claim is the same if it arises out of the same transaction.

This Court held that the negligence/malpractice claim alleged in *Taylor v. Babbitt* and the claim alleged in *Taylor v. Riley* arose out of the same transaction or series of transactions (specifically the SRA and the related Opinion Letter). *Taylor v. Riley*, 157 Idaho at 333, 336 P.3d at 266. Taylor's present claims for negligent misrepresentation, breach of fiduciary duty, fraud and vicarious liability also arise out of that same transaction.[5] This element is met for all claims brought in this action.

(2) Different or New Theories of Liability Do Not Preclude the Res Judicata Bar.

The transactional approach to res judicata rejects the view that a claim is synonymous with, or limited to, a particular legal theory.

> The issue is not simply whether the two lawsuits involve the identical claim. "A cause of action can be barred by a prior adjudication even though the theory of liability . . . differ[s] from the cause of action actually litigated in the prior lawsuit." The issue is whether both lawsuits arose out of the same transaction or series of transactions.

Taylor v. Riley, 157 Idaho at 332, 336 P.3d at 265. This Court explained that "[a] subsequent lawsuit is not a different claim merely because the plaintiff seeks the same result under a different theory of liability. Under the doctrine of res judicata, claim preclusion is not limited to the theories that were actually litigated in the prior lawsuit." *Id.*, 157 Idaho at 333, 336 P.3d at 266.

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[5] Taylor agrees – "[t]he original transaction that spawned the lawsuits involved in the underlying litigation as well as the present appeal was an illegal contract pursuant to which AIA Services was to redeem the shares of stock owned by Taylor . . . ." Appellant's Brief, p. 2.

In analyzing the negligence/malpractice claim in both lawsuits, this Court noted that in *Taylor v. Babbitt*, Taylor sought to recover against Riley on a different legal theory than that asserted in the present lawsuit. *Taylor v. Riley*, 157 Idaho at 333, 336 P.3d at 266. In *Taylor v. Babbitt*, Taylor based his negligence/malpractice claim on the legal theory that Riley took a position contrary to the opinions expressed in the Opinion Letter. *Id.* In the present action, negligence/malpractice is based on negligently preparing the Opinion Letter. *Id.* Nevertheless, this Court determined that the present negligence/malpractice claim was barred even though it was based on a different legal theory than the prior claim. *Id.* Taylor's present claims for negligent misrepresentation, breach of fiduciary duty, fraud and vicarious liability are not different than his claims in *Taylor v. Babbitt*. They are the same claims based on different theories of liability and are barred.

(3) Different or New Facts Do Not Preclude the Res Judicata Bar.

"A cause of action can be barred by a prior adjudication even though the . . . supporting evidence differ[s] from the cause of action actually litigated in the prior lawsuit." *Taylor v. Riley*, 157 Idaho at 32, 336 P.3d at 265.

In the Permissive Appeal, this Court rejected the district court's determination and Taylor's arguments that res judicata did not apply because the prior lawsuit focused on facts occurring in 2007 and 2008 (taking positions contrary to the Opinion Letter) and the present lawsuit focused on facts occurring in 1995 (when the Opinion Letter was issued). *Id.* 157 Idaho at 333, 336 P.3d at 266. Despite different supporting facts and evidence from those in the prior lawsuit, this Court determined Taylor's present negligence/malpractice claim was barred. *Id.*

The facts and evidence supporting the present negligence/malpractice claim are the same facts and evidence supporting the present claims for negligent misrepresentation, breach of fiduciary duty, fraud and vicarious liability. All of the present claims are barred by res judicata even if the facts and evidence differ from those presented in the prior action.

(4) All Damages Arising Out of the Same Claims are Barred.

Res judicata not only bars all claims but also all damages arising out of those claims. "When a valid and final judgment rendered in an action extinguishes the plaintiff's claim . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction . . . out of which the action arose." *Nash v. Overholser*, 114 Idaho 461, 464, 757 P.2d 1180, 1183 (1988), (concurring opinion)(*quoting with approval Aldape v. Akins*, 105 Idaho at 258-59, 668 P.2d at 134-35.) A party is barred from bringing further claims seeking the same damage. *Taylor v. Riley*, 157 Idaho at 333, 336 P.3d at 266. In the Permissive Appeal, this Court held "[i]n both cases, Mr. Taylor seeks damages for the same basic wrong – his inability to recover the sums owing for the redemption of his stock." *Id.* Taylor's claims of negligent misrepresentation, breach of fiduciary duty, fraud and vicarious liability also seek the same damage – sums owing for the same stock redemption. These damages are barred because they are the same damages sought in *Taylor v. Babbitt*.

The "same claim" analysis and result applied to negligence/malpractice apply with equal force to the present claims of negligent misrepresentation, breach of fiduciary duty, fraud and vicarious liability and that element is met for all claims brought in this action.

c. There Was a Final Judgment in the Prior Litigation.

This Court has already determined there was a final judgment in *Taylor v. Babbitt* and that it met the final judgment element in the present action. *Taylor v. Riley*, 157 Idaho at 334, 336 P.3d at 267. The same final judgment applies to all of Taylor's claims and the final judgment element is met.

This Court's ruling that all three elements of res judicata were met to bar the negligence/malpractice claim applies with equal force to the remaining claims for negligent misrepresentation, breach of fiduciary duty, fraud, and vicarious liability. Dismissal of each of the claims on the grounds they are barred should be affirmed.

2. Fraud is Further Barred by Final Judgment in *Taylor v. AIA* (Collateral Estoppel).

"Five factors are required in order for issue preclusion (collateral estoppel) to bar the relitigation of an issue determined in a prior proceeding: (1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; (2) the issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation." *Ticor Title Co. v. Stanion*, 144 Idaho 119, 124, 157 P.3d 613, 618 (2007). Taylor argues that collateral estoppel does not bar his present fraud claim because it is a different fraud claim than that raised in *Taylor v. AIA* and is based on different (new) facts. Consequently, he argues he did not have a full and

fair opportunity to litigate this "different" fraud claim in *Taylor v. AIA* and the issues were not the same or actually decided in that prior litigation.

Taylor applies collateral estoppel too narrowly. Collateral estoppel is an issue preclusion doctrine rather than a claim preclusion doctrine. Taylor's present fraud claim has the same foundational elements (issues) as his prior fraud claim. If Taylor had a full and fair opportunity to litigate even one of those elements and it was actually litigated and decided in *Taylor v. AIA*, he is collaterally estopped from litigating his fraud claim in this action. Several of the elements (issues) of fraud were litigated and decided in *Taylor v. AIA*.

Fraud requires proof of nine elements: (1) a statement of fact; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity; (5) the speaker's intent to induce reliance; (6) the hearer's ignorance of the falsity of the statement; (7) reliance by the hearer; (8) the hearer's right to rely; and (9) consequent and proximate injury. *Lettunich v. KeyBank National Assoc.*, 141 Idaho 362, 368, 109 P.3d 1104, 1110 (2005). At least three of these elements (issues) were decided against Taylor in *Taylor v. AIA*: (1) statement of fact; (2) the hearer's ignorance of the falsity of the statement; and (3) the hearer's right to rely.

In *Taylor v. AIA*, this Court upheld the District Court's ruling that the Opinion Letter contained no statement of fact. *Taylor v. AIA*, 151 Idaho at 566, 261 P.3d at 843 (The opinion in the Opinion Letter "is simply an opinion based on one's interpretation of law and cannot form the basis for a fraud claim."). Taylor cannot now relitigate this foundational issue – whether there was a statement of fact.

This Court also determined that Taylor had, or should have had, knowledge of any alleged falsity in the Opinion Letter.

> Nothing suggests that Reed Taylor, as CEO and Chairman of the Board, as well as majority shareholder, was justifiably ignorant as to the circumstances causing the illegality – the insufficient earned surplus and absence of a shareholder vote explicitly authorizing the use of capital surplus.
>
> Reed Taylor sets forth a lengthy explanation in his brief as to how he was in no position to understand the circumstances surrounding the Stock Redemption Agreement and how AIA Services and its attorneys were in a better position to understand the situation and are thus more at fault. The district court ruled: "This is not a case where the parties to the agreement were not *in pari delicto* . . . If Reed Taylor was uninformed as to the financial status of his corporation, that was a voluntary choice on his part and is insufficient to make him an innocent party to the agreement." We agree. Reed Taylor was the majority shareholder of AIA Services, CEO and Chairman of the Board when he entered into the Stock Redemption Agreement.

Id., 261 P.2d at 842-43. Taylor cannot relitigate that he had no knowledge of any alleged falsity in the Opinion Letter. Also, because Taylor had, or should have had, knowledge of any falsity, he had no right to rely on the Opinion Letter.

All five factors of collateral estoppel are met as to at least three issues relating to fraud. Taylor had a full and fair opportunity to litigate these elements of fraud in *Taylor v. AIA*. These elements of fraud are identical in both the prior and present litigation. The issues of whether there was a statement of fact, whether Taylor was ignorant of the falsity of any statements of fact and whether he had a right to rely were actually decided in *Taylor v. AIA*. There was a final judgment on the merits in that litigation. Finally, Riley was in privity with AIA, a party to the prior litigation. Riley was one of AIA's attorneys. R. 563. The Opinion Letter was prepared and

delivered in the course of representing AIA Services and at AIA's request. *Id.* Attorneys are in privity with their clients. *Taylor v. Riley*, 157 Idaho at 335, 336 P.3d at 268.

Regardless of whether Taylor is calling his fraud claim fraudulent inducement, constructive fraud or fraudulent concealment, at least one of the common elements of each type of fraud has been decided against him. Taylor is collaterally estopped from relitigating fraud in the present action, however denominated.

3. All of Taylor's Present Claims Were or Might Have Been Brought in the Prior Action; Each Claim Had Accrued and Was Ripe Before *Taylor v. Babbitt* Was Filed or Final Judgment Entered.

Taylor argues that his claims were not ripe until June 17, 2009 when the district court in *Taylor v. AIA* issued its decision that the SRA was illegal. Alternatively, Taylor argues his fraud claim was not ripe until February 22, 2012, when he first discovered the "facts", analysis and reasoning underlying the 1995 Opinion Letter. Because his claims were not ripe, Taylor argues, he could not have brought them in the prior litigation (*Taylor v. Babbitt)* and consequently none of his claims are barred. These arguments do not save Taylor's claims from application of res judicata or collateral estoppel. All of his claims were actually brought, were ripe and had accrued before the filing of or final judgment in *Taylor v. Babbitt* and nothing "discovered" in February 2012 was new.

a. Taylor's Present Claims Were Actually Brought in *Taylor v. Babbitt*.

Taylor brought his current claims for negligence, breach of fiduciary duty, fraud and vicarious liability in *Taylor v. Babbitt*.[6] R. 620-645; 672-716. Nevertheless, he argues on appeal that none of these claims were ripe and, therefore, none could have been brought in that action. His argument is belied by his actions. Regardless of whether these claims were ripe, Taylor actually brought each of them in that action. It does not matter whether these claims were actually ripe or had any merit. *See Taylor v. Riley*, 157 Idaho at 334, 336 P.2d at 267 ("In applying the doctrine of res judicata, it does not matter that the claim against Mr. Riley based upon his failure to defend his Opinion Letter was patently frivolous . . . .") "The fundamental purposes served by the doctrine of res judicata are not based upon the merits of the claim asserted in the prior litigation or whether it was the primary claim asserted." *Id.* "A party may set forth two or more statements of a claim or defense alternatively or hypothetically . . . ." *Id.* (quoting IRCP 8(a)(2).) Taylor cannot argue that his claims could not have been brought in *Taylor v. Babbitt*. These claims were brought in that action and are barred by res judicata.

Regardless, Taylor concedes he suffered some damage on June 17, 2009. Because no final judgment in *Taylor v. Babbitt* had been entered on that date, he could have brought his claims in that prior action.

[6] Taylor did not bring his current claim for negligent misrepresentation in *Taylor v. Babbitt*. Nevertheless, he might have and should have because it is a claim arising out of the same transaction involving the same parties and seeking the same damages.

b. Taylor's Claims Accrued Before Final Judgment in *Taylor v. Babbitt* (3/24/10).

Taylor concedes that he suffered some damage on June 17, 2009 when the illegality decision was entered, and, based on that date, argues that his present claims for negligence/ malpractice, negligent misrepresentation and breach of fiduciary duty accrued as of that date and could not be brought in *Taylor v. Babbitt*. Appellant's Brief, p. 16. *Taylor v. Babbitt* was still pending on that date. There was no final judgment until March 24, 2010. *Taylor v. Riley*, 157 Idaho at 330, 336 P.3d at 263. Because *Taylor v. Babbitt* was still pending, Taylor could have brought these claims in that action even using his accrual date.

Rule 11(a)(2)(B) states that a motion for reconsideration of any interlocutory order of the trial court may be made at any time before entry of final judgment, but not later than fourteen (14) days after entry of final judgment. I.R.C.P., Rule 11(a)(2)(B). A dismissal of a complaint is an interlocutory order until a final judgment or Rule 54(b) certificate is signed. *Idaho First National Bank v. David Steed & Associates, Inc.*, 121 Idaho 356, 361, 825 P.2d 79, 84 (1992). Rule 11(a)(2)(B) provides express authority for a trial court to reconsider and vacate interlocutory orders. *Telford v. Neibaur*, 130 Idaho 932, 934, 950 P.2d 1271, 1273 (1998). A trial court can consider new facts or evidence upon a motion for reconsideration. *Johnson v. Lambros*, 143 Idaho 468, 471-72, 147 P.3d 100, 103-4 (Ct.App. 2006). The district court retains jurisdiction to rule upon a motion for reconsideration, even during the pendency of an appeal. I.A.R. 13(b)(7).

Taylor could have filed a motion for reconsideration of the dismissal of his complaint in *Taylor v. Babbitt* to allow him to plead these "new" claims. He could have done so up to and including fourteen (14) days after entry of final judgment on March 24, 2010. Taylor had more than nine (9) months after Judge Brudie's June 17, 2009 ruling to bring these claims in *Taylor v. Babbitt* and his failure to do so bars him from relitigating those claims in this subsequent litigation.

Taylor argues, however, claims that accrue after the prior litigation is filed are not claims that could have been brought in the prior litigation even if they accrue during its pendency. There is no Idaho case law supporting the filing date as the cutoff for determining whether a claim might have and therefore should have been brought in prior litigation. The Idaho cases relied on by Taylor do not support this contention and both can be easily distinguished. [7]

In *Duthie v. Lewiston Gun Club*, 104 Idaho 751, 754, 663 P.2d 287, 290 (1983), this Court held that matters raised in a second suit were not ripe for adjudication in the first suit when "facts occurred subsequent to the first trial [] led to the filing of the second suit." *Id.* In the first

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[7] Taylor also relies on two additional cases from non-controlling jurisdictions – *Allied Fire Protection v. Diede Const., Inc.*, 127 Cal. App. 4th 150, 155 (2005) and *Los Angeles Branch NAACP v. Los Angeles Unified School Dist.*, 750 F.2d 731, 739 (9th Cir. 1984) – for the proposition that "the bar of res judicata is 'framed by the complaint at the time it is filed.'" Appellant's Brief, p. 16. The Idaho Supreme Court, however, has squarely rejected this approach. *See Duthie v. Lewiston Gun Club*, 104 Idaho 751, 753, 663 P.2d 287, 289 (1983) ("In reviewing this issue, the trial court held that res judicata applies only to issues raised by the pleadings. . . . [W]e disagree with the trial court's finding that res judicata applies only to issues raised by the pleadings. . . . Therefore, not raising the issue in the pleadings is not grounds for denying the motion [to bar a claim on res judicata grounds] because . . . res judicata applies to every matter which might and should have been litigated in the first suit whether or not it was raised in the pleadings.").

suit, the district court dismissed the action based on its finding that the Duthies had a license to hook up to the Gun Club's waterline and therefore could not be trespassers. A few months after the first suit was resolved, the Gun Club cut and capped the waterline, effectively revoking the Duthies' license. The Duthies then filed the second suit against the Gun Club and argued that the Gun Club should be precluded from arguing that the license was revoked, because that issue should have been raised in the first action. This Court affirmed the district court's decision rejecting the Duthies' argument. This Court reasoned that the facts that occurred subsequent to the first trial – "i.e., the cutting and capping of the waterline" – "triggered the filing of the second suit." *Id.* Consequently, neither the Duthies' claim that their license was improperly revoked nor the facts used to support that claim (the cutting and capping of the waterline) existed during the pendency of the first lawsuit and, indeed, that new claim could not have been brought until the second suit.

The second Idaho case relied on by Taylor, *Bell Rapids Mutual Irrigation Co. v. Hausner*, 126 Idaho 752, 754, 890 P.2d 338, 340 (1995), is also distinguishable. In the first suit, Bell Rapids sued Hausner to collect certain unpaid operating and maintenance fees leveled against her from 1988 through 1991. The district court found in favor of Hausner, ruling that the fees were "illegal and uncollectable." Bell Rapids did not appeal. In September of 1993, Bell Rapids sued Hausner again – this time to collect the operating and maintenance fees for 1992. The Court applied *Duthie* ("Applying the *Duthie* test of the time of trial as the time to determine ripeness . . . .") and held that the second claim (for the 1992 fees) did not become ripe until sometime after the first suit was submitted to the trial court, and accordingly, the second claim

was not barred by claim preclusion. *Bell Rapids*, 126 Idaho at 754, 890 P.2d at 340. The Court reasoned that the first case was submitted to the district court in January 1992, but that the major portion of the 1992 operating and maintenance fees did not become due until April 1, 1992. *Id.*

These cases stand for the common sense proposition that when new facts occur after a case is finally resolved and those new facts trigger a new claim, that new claim is not necessarily precluded by res judicata. But this general rule is inapposite here. In both *Duthie* and *Bell Rapids*, new facts that occurred after resolution of the first case triggered claims that did not previously exist. Here though, we have only "new facts" offered in support of the same tired claims that were previously brought in *Taylor v. Babbit* and *Taylor v. AIA*. In stark contrast to the circumstances presented in *Duthie* and *Bell Rapids*, the so-called "new facts" alleged by Taylor, did not trigger new claims or the filing of the second suit. Rather, the second suit (*Taylor v. Riley*) was already two-and-a-half years old when these "new facts" were "discovered" in February or March of 2012 and they related to claims already existing. Simply put, *Duthie* and *Bell Rapids* have no applicability to the present case.

Asserting that his claims for negligence/malpractice, negligent misrepresentation, and breach of fiduciary duty did not accrue until June 17, 2009, after *Taylor v. Babbitt* was filed, does not save Taylor's claims from the res judicata bar. Final judgment in the prior litigation is what bars subsequent claims. These claims ripened, based on Taylor's own accrual date, before final judgment in the prior litigation. Taylor could have brought these claims in *Taylor v. Babbitt*. His failure to do so precludes him from relitigating them in this action.

Alternatively, June 17, 2009 is not the date his claims ripened. Taylor's argument that his claims did not ripen until the SRA was determined to be illegal assumes that there must be an adverse ruling in a prior action determining that the foundational agreement is invalid before a claim ripens. A claim against an attorney opinion-giver does not, however, ripen only after the underlying transaction is determined to be invalid and, consequently, can be brought before an adverse ruling. For example, in *Sirote & Permut, P.C. v. Bennett*, 776 So.2d 40 (Ala. 2000), the court held that the claims of the purchasers of revenue bonds against the attorneys who issued opinion letters regarding the validity and enforceability of the bonds ripened when they purchased the bonds, not when the bonds were later held by a court to be invalid. *Id.* 776 So.2d at 45. In *Mark Twain Kansas City Bank v. Jackson, Brouillette, Pohl & Kirley, P.C.*, 912 S.W.2d 536 (Mo.App. 1995), the plaintiff sued a law firm for negligence in the preparation of an opinion letter while underlying litigation regarding the validity of a real estate loan was still pending. *Id.* 912 SW2d at 540. In *Mega Group, Inc. v. Pechenik & Curro, P.C.*, 819 N.Y.S.2d 796 (2006), the plaintiff was allowed to file suit against attorneys who gave an opinion regarding the legality of the sale of corporate stock even though litigation over the legality of the stock sale was still pending and had not been resolved. *Id.* 819 N.Y.S.2d at 798. Taylor's claims ripened before the adverse ruling in *Taylor v. AIA*.

This Court also rejected the argument that a claim is not ripe until the judge makes an adverse ruling in the prior litigation. In *Berkshire Investments LLC v. Taylor*, 153 Idaho 73, 83, 278 P.3d 943, 953 (2012), this Court barred numerous claims that were raised in prior litigation. *Id.* 513 Idaho at 82-83, 278 P.3d at 952-953. This Court also barred other claims because they

stemmed either from the same transaction (the sale of real property) or the subsequent lawsuit over that transaction. *Id.* The Mailes argued, as Taylor does here, that these latter claims were not ripe until the alleged misrepresentation resulted in Judge Wilper's adverse judgment. *Id.* This Court noted that "[a]ll of the conduct on which those claims are based – the execution of the Disclaimer, the filing of the Taylors' petition for appointment as trustees, and the filing of the amended complaint – occurred and was made known to the Mailes while [the prior litigation] was pending, before Judge Wilper even proceeded to the merits of the case." *Id.* A party cannot await an adverse ruling before asserting a cause of action, if the operative facts are known. *See Id.*

Finally, the adverse judgment rule espoused by Taylor does not apply. This "adverse judgment accrual rule" has been limited to situations in which the claimant is the defendant in the underlying litigation. *Bluewater Partners, Inc. v. Edwin D. Mason, Foley and Lardner*, 975 N.E.2d 284, 301 (Ill.App. 2012). Under the adverse judgment accrual rule, "[p]ublic policy favors such a delay to permit a determination as to whether the advice of counsel was in fact negligent. If the malpractice plaintiff is found not liable in the underlying suit, then the favorable determination of the suit forecloses the element of damages." *Bluewater*, 975 N.E.2d at 301 (citation omitted). The rule is otherwise, however, where the claimant is the plaintiff in the underlying litigation. *Id.*

Taylor was the plaintiff in the action in which the adverse ruling was made.[8] Applying *Bluewater* and *Berkshire*, Taylor's claims against Riley and Hawley Troxell ripened, at a minimum, contemporaneously with his challenge to the illegality defense. He did not have to await an adverse decision before bringing his present claims in *Taylor v. Babbitt*. All of Taylor's claims could have been brought before the adverse ruling on June 17, 2009.

Regardless of the June 17, 2009 date, and even if the filing date of the prior action is the cutoff date for determining whether res judicata bars "new" claims, all of Taylor's claims accrued and were therefore ripe before *Taylor v. Babbitt* was filed.

c. Taylor's Claims Accrued Before *Taylor v. Babbitt* was filed (08/18/08).

Taylor argues this Court used the wrong accrual date (April 16, 2008) when it held that his negligence/malpractice claim was barred and that, because his claims did not accrue until June 17, 2009 (when the illegality decision was entered), none of his claims are barred.

(1) The April 16, 2008 Date of Accrual is the Law of the Case.

In the Permissive Appeal, this Court held that at the time Taylor filed *Taylor v. Babbitt*, "he had a cause of action against Mr. Riley for his alleged negligence in issuing the Opinion Letter" based on the district court's determination that it accrued in April 2008.[9] *Taylor v. Riley*, 157 Idaho at 333, 336 P.3d at 267. That Taylor's negligence claim against Riley accrued in April 2008 is the law of the case and applies to all of his tort based claims.

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[8] This distinguishes *Buxton* and makes it inapplicable here. In *Buxton*, the malpractice claimant (City of McCall) was the defendant in the underlying construction litigation. *Buxton*, 146 Idaho 656, 657-658, 201 P.3d 629, 630-631 (2009).

[9] This is the date when a motion for partial summary judgment was filed in *Taylor v. AIA* asserting the SRA was an illegal contract. *Taylor v. Riley*, 157 Idaho at 329, 336 P.3d at 262.

The law of the case doctrine provides that "upon an appeal, when the Supreme Court, in deciding a case presented, states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent appeal . . . ." *State v. Hawkins*, 155 Idaho 69, 72, 305 P.3d 513, 516 (2013). Moreover, "the law of the case generally prevents consideration on a subsequent appeal of alleged errors that might have been, but were not, raised in an earlier appeal." *State v. McCabe*, No. 43430, 2016 WL 4585876, at *1 (Idaho Ct. App. 2016). "Idaho cases establish that the application of the [law of the case] rule is mandatory" as opposed to discretionary. *Swanson v. Swanson*, 134 Idaho 512, 518, n. 3, 5 P.3d 973, 979 n. 3 (2000).

This Court found that Taylor's negligence/malpractice claim accrued in April 2008. This accrual date must be adhered to throughout this subsequent appeal. Taylor cannot relitigate whether his negligence/malpractice claim against Riley accrued in April 2008. The law of the case should also preclude him from relitigating that accrual date in relation to his claims of negligent misrepresentation and breach of fiduciary duty. If April 2008 applies as the accrual date of Taylor's tort based claims (negligence/malpractice, negligent misrepresentation and breach of fiduciary duty), each was ripe and could have been brought in *Taylor v. Babbitt* before it was filed.

(2) Some Damage Occurred Prior to *Taylor v. Babbitt* When Taylor Incurred Attorney Fees Responding to the Illegality Defense.

Accrual of tort-based claims has historically been determined under the "some damage" rule.[10] *Reynolds v. Trout, Jones, et al.,* 154 Idaho 21, 24, 293 P.3d 645, 648 (2013). A cause of action cannot accrue until there is objective proof that some damage has occurred. *Id.* Taylor argues that the attorney fees he incurred responding to the illegality defense was not some damage for purposes of accrual of his tort based claims.

In the Permissive Appeal, this Court affirmed the district court's holding that "Mr. Taylor's cause of action against Mr. Riley based upon the issuance of the Opinion Letter accrued in April 2008 when he was required to incur attorney fees to counter the claim that the Stock Redemption Agreement was an illegal contract." *Taylor v. Riley*, 157 Idaho at 333, 336 P.3d at 267. This holding necessarily implies that incurring these attorney fees was some damage. As discussed *supra*, some damage occurred in the form of attorney fees responding to the illegality defense and is law of the case and should be applied to the other claims. Regardless, some damage occurred when the illegality defense was first asserted.

The illegality defense was first asserted on April 16, 2008. *Taylor v Riley*, 157 Idaho at 329, 336 P.3d at 262. Taylor incurred attorney fees responding to those illegality allegations.

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[10] The some damage rule does not apply to Taylor's fraud claim, which will be addressed *infra*. The four year statute of limitations found in Idaho Code § 5-224 applies to breach of fiduciary duty. *See Jones v. Kootenai County Title Ins. Co.*, 125 Idaho 607, 873 P.2d 861 (1994). It is unclear whether the "some damage" rule applies to this statute but, for purposes of this analysis, it is assumed that it does. There is no case law establishing what statute of limitations applies to negligent misrepresentation but, again, the some damage rule is assumed to apply.

Id., 157 Idaho at 333, 336 P.3d at 266. These attorney fees were incurred prior to filing *Taylor v. Babbitt*. Some damage was suffered when Taylor incurred attorney fees responding to the illegality defense.

Taylor also suffered some damage in the form of different attorney fees and costs because of Riley's alleged wrongful acts.

> If Riley had disclosed these facts to Taylor and/or Idaho courts before or during the AIA litigation, much of the time and expense associated with the discovery disputes involved in those lawsuits could have been avoided.

Appellant's Brief, p. 38. Taylor testified as follows:

> Over the course of the next several years, I was forced to file two additional lawsuits ("*Taylor v. McNichols*" [and *Taylor v. Babbitt*]) and spend hundreds to thousands of dollars paying attorney's fees, expert witness fees, costs and judgments entered against me (and attorney fees awarded against me). I incurred well over $1,200,466 litigating over issues caused [by the] illegal 1995 redemption of my shares.

R. 6353. Taylor incurred some damage in the form of attorney fees, expert fees, costs and judgments to respond to the illegality defense and to litigate various lawsuits arising out of the SRA and the Opinion Letter, including *Taylor v. AIA* commenced in 2007.

(3) Some Damage Occurred Before *Taylor v. Babbitt* When Taylor Incurred Attorney Fees Asserting Various Breaches of Duties That Did Not Depend On the Outcome of the Illegality Defense.

Months before *Taylor v. Babbitt* was filed, Taylor asserted wrongful conduct against Riley and Hawley Troxell, including breach of various duties owed to him because they took a position contrary to the representations made in the Opinion Letter, failed to assist him to prove

that the SRA was not illegal, prevented him from deposing Riley, and took other actions that thwarted his efforts to collect sums owed to him under the SRA. R. 377, 379-382.

On July 21, 2008 Taylor threatened, through his attorney, to sue Riley and Hawley Troxell for taking positions contrary to the Opinion Letter. Taylor demanded that the AIA Board of Directors sue Riley and Hawley Troxell for, among other things: "representing AIA Services and/or AIA Insurance in making inappropriate arguments (including alleged illegality of the debt to Reed) knowing that such arguments were counter to AIA Services' obligations to Reed and Donna and knowing that Richard Riley was a witness who provided a legal opinion counter to such arguments." R. 379-382. On August 5, 2008, Taylor, through his attorney, threatened to sue Riley and Hawley Troxell based on, among other things, the Opinion Letter and taking contrary positions:

> Explain to Mr. [Merlyn] Clark how Richard Riley issued an opinion letter to Reed [Taylor] and you are not t[r]ying to disingenuously argue the $8.5 million is not owed to him . . . Explain to Mr. Clark that even if the illegality argument had merit, Donna Taylor and Reed Taylor would be suing Hawley Troxell (and Richard Riley) in such an instance regardless of the circumstances.

R. 377 (underlining and parenthetical in original). *See also Taylor v. Riley*, 157 Idaho at 329-330, 336 P.2d at 262-263. Before *Taylor v. Babbitt* was filed, Taylor was encouraging a lawsuit against Riley and Hawley Troxell by AIA and personally threatening a lawsuit based on taking positions contrary to the Opinion Letter and acknowledging that these suits would be brought regardless of the outcome of the illegality doctrine.

Taylor also alleged that, after he filed *Taylor v. AIA* to recover the sums he was owed but before *Taylor v. Babbitt* was filed, Riley and Hawley Troxell "took various actions which

thwarted his attempts to recover the sums to which he was entitled under the Stock Redemption Agreement." *Taylor v. Riley,* 157 Idaho at 332, 336 P.3d at 265.

> Those alleged actions included assisting in stopping payments owing under the Stock Redemption Agreement; participating in a joint defense agreement, which their clients entered into with other defendants; obtaining and maintaining a restraining order and preliminary injunction that prevented him from voting the stock of AIA Insurance, Inc., in which he had a security interest to secure payment of the sums due under the Stock Redemption Agreement; and taking actions that caused the values of the two corporations to plummet, to the detriment of Mr. Taylor as the major creditor.

Id. This conduct, all of which occurred before *Taylor v. Babbitt*, was alleged by Taylor to constitute willful interference with property and money which belonged to and/or should have been under his possession and/or control and these actions deprived him of possession of such property and money. *Id.,* 157 Idaho at 332-333, 336 P.3d at 265-266. These pre-*Taylor v. Babbitt* wrongful acts were alleged to have constituted professional negligence and/or breach of fiduciary duties which conduct damaged Taylor. *Id.* at 333, 266. These wrongful acts were based on litigation conduct in *Taylor v. AIA* and formed a basis for the claims brought in *Taylor v. Babbitt.*

Taylor, through his attorney, conceded that Taylor suffered damage based on attorney's litigation conduct, before *Taylor v. Babbitt* was filed. R. 3257. The damages identified by Taylor as having been suffered were his inability "to take possession of the collateral, funds have continued to be used inappropriately, and business decisions made that were not approved by Reed Taylor." *Id.*

This conduct did not become wrongful because Taylor later lost the illegality issue. That alleged wrongful conduct existed regardless of the outcome of the illegality defense. That alleged wrongful conduct would have been wrongful even if the SRA was deemed legal and enforceable. Taylor acknowledged that the alleged wrongful conduct existed regardless of the outcome of the illegality defense. That alleged wrongful conduct was based on or related to the Opinion Letter. Consequently, before *Taylor v. Babbitt*, Taylor had breach of duty claims independent of the subsequent illegality decision in *Taylor v. AIA*. This was proven when Taylor sued Riley and Hawley Troxell in *Taylor v. Babbitt* based on this wrongful conduct before the illegality decision was issued.

Taylor incurred attorney fees and non-attorney fee damage asserting this wrongful conduct and threatening suit against Riley and Hawley Troxell, and as a result of this alleged misconduct. These attorney fees constitute some damage suffered by Taylor before *Taylor v. Babbitt* was filed. Based on this damage, Taylor's tort based claims ripened before the prior litigation was filed.

(4) Some Damage Occurred Because of the Opinion Letter when Taylor Entered into the SRA.

Taylor has alleged in prior litigation and argues now on appeal that, if the allegedly concealed facts, analysis and reasoning underlying the Opinion Letter had been made known to him before he entered into the SRA, he would not have elected to sell his shares or would have voted his shares to authorize the proper funds.

> [I]f Mr. Riley's Opinion Letter had been correct, I would have either voted my shares to authorize the transaction under Idaho Code § 30-1-6 or I would have

> simply kept my shares and ran off the commissions generated on the policies that had already been sold. Either way, I would have obtained the $6,000,000 owed to me for my lost shares and unenforceable $6M Note. I would not have incurred any of the damages set forth above had Mr. Riley's Opinion Letter been correct or had it provided the necessary disclosures and reasoning for his opinions.

R. 6352-53; 6375. Taylor claims he would not have sold his shares without the Opinion Letter or would have voted his shares if certain disclosures had been made. R. 6351. He admits he suffered damages when he sold his shares in reliance on the representations in the Opinion Letter and failure to disclose the facts necessary to make it not misleading. *Id.* Taylor suffered some damage as a result of Riley's alleged wrongful conduct when he relinquished his shares in 1995.

Alternatively, Taylor argues that had Riley advised him that the redemption did not comply with the statutes or provided him with his reasoning why he felt the transaction was legal, he would have "called a shareholder meeting and voted my shares to approve a shareholder resolution or amendment to the Articles of Incorporation to authorize the use of capital surplus in compliance with Idaho Code § 30-1-6." R. 6352. The SRA was determined to be illegal because there was insufficient earned surplus and there was no shareholder resolution or amendment to the Articles of Incorporation to authorize the use of capital surplus to redeem Taylor's shares. *Taylor v. AIA*, 151 Idaho at 565, 261 P.3d at 842. Taylor argues that because Riley failed to make these disclosures, Taylor lost the opportunity to cure the illegality of the SRA. This loss of opportunity represents some damage.

In *Buxton*, this Court determined that lost opportunity was sufficient damage to trigger the accrual of certain claims. *Buxton*, 146 Idaho at 663, 201 P.3d at 636. The City of McCall

alleged that its attorneys negligently advised the City to release its claims against J-U-B on July 25, 2002. This Court held:

> That was the date on which the City lost its opportunity to recover against J-U-B, and the date on which the damage occurred if the Attorneys negligently advised the City to release J-U-B from liability . . . .

Id. The City of McCall also alleged that its attorneys negligently advised the City not to accept an offer to settle and the City rejected the offer in September 2003. *Id.* This Court determined that was the date when the City suffered objectively ascertainable damage from the alleged negligence of its attorneys because it "lost its opportunity to settle this case for that amount." *Id.* Here, like in *Buxton*, Taylor lost an opportunity based on Riley's alleged negligence – to cure the illegality of the SRA. Taylor suffered damage in 1995 (long before *Taylor v. Babbitt*) when he sold his shares pursuant to the SRA and lost the opportunity to make the SRA legal.

(5) Some Damage Is Not the Trigger for Accrual of Tort-Based Claims.

The term "some damage" does not appear in the statutes of limitation applicable to tort-based claims. *See* Idaho Code § 5-219(4) and § 5-224. It is a judicial construct. In *Hoffer*, this Court recognized that the phrase "frivolous, unreasonable, or without foundation" is not language found in Idaho Code § 12-121. *Id.*, 160 Idaho at _____, 380 P.3d at 695. Based on the absence of this language, this Court overturned decades of precedent and established that attorney fee awards must be made under the literal words of that statute and not based on words that did not appear in it. *Id.* Consistent with *Hoffer*, Idaho Code §§ 5-219(4) and 5-224 also should be interpreted based on its literal words. Neither contains the words "some damage."

It is up to the legislature to determine if the term "some damage" should be added to the statute. *See Stephens v. Stearns*, 106 Idaho 249, 259, 678 P.2d 41, 51 (1984) (J. Bakes dissent) ("The majority does not deny, however, that the legislature has the power to commence the accrual of a cause of action prior to any damage occurring. Indeed, the majority acknowledges as much by stating, *ante* at 46, that while the general rule is that "'the statute of limitations does not begin to run against a negligence action until some damage has occurred . . .' the legislature has modified this general rule by enacting I.C. § 5-241 [which] section causes accrual only if one's cause of action has not accrued prior to six years after completion of construction.").

As Justice Bakes recognized, the legislature can provide that a claim accrues before injury or before "some damage" occurs. *See* Idaho Code § 5-241. That statute provides that tort claims relating to construction of real property shall accrue and begin to run six years after final completion. *Id.* For instance, a claim for professional malpractice in a construction design setting must be brought no later than eight years following the completion of construction regardless of whether "some damage" has been suffered. *See Barab v. Plumleigh*, 123 Idaho 890, 893, 853 P.2d 635,638 (Ct.App. 1993). *See also West v. El Paso Products Co.*, 122 Idaho 133, 136, 832 P.2d 306, 309 (1992). Consequently, if a person falls down a negligently designed flight of stairs nine years after the stairs were completed, thus suffering some damage, the claim against the architect is barred (i.e., the trigger is not when "some damage" occurred).

Consistent with *Hoffer*, the statutes of limitation applicable to negligence, negligent misrepresentation and breach of fiduciary duty should be applied as written and without reference to some damage. Here, the occurrence, act or omission complained of occurred in 1995

when the Opinion Letter was issued. That was when the alleged negligence occurred. That was when the alleged non-disclosure occurred. The time within which Taylor was required to bring his current negligence-based claims expired in 1997. Dismissal of these claims can be based on the alternative grounds that the applicable statute of limitations expired prior to filing the present suit.

b. Taylor's Fraud Claim Accrued Before Final Judgment in *Taylor v. Babbitt*.

The statute of limitation for fraud, constructive fraud and fraudulent concealment is three years and accrues upon discovery, by the aggrieved party, of the facts constituting fraud. Idaho Code § 5-218(4). Taylor claims he did not discover facts, analysis or reasoning underlying the Opinion Letter that allegedly would have made it not misleading until February 22, 2012. In order for Taylor to escape the bar of res judicata on his fraud claim he has to show he had no knowledge, actual or constructive, of the facts constituting fraud before final judgment in *Taylor v. Babbitt* was entered. Taylor knew facts sufficient to bring fraud long before *Taylor v. Babbitt* was filed.[11]

Taylor's fraud claims are based on allegations that Riley concealed the following:

1. He intentionally deviated from the plain meaning of earned surplus under Idaho Code § 30-1-6;
2. He believed the transaction and Opinion Letter were correct;
3. The representation that all necessary shareholder consents had been obtained was based on Riley's belief that AIA had sufficient earned surplus;

[11] That Taylor has sufficient facts necessary to allege fraud before *Taylor v. Babbitt* was filed is proven by the fact that he alleged fraud in connection with the Opinion Letter in *Taylor v. AIA* and actually brought an Opinion Letter fraud claim in *Taylor v. Babbitt*.

4. He relied upon "fair value" to opine that AIA had sufficient earned surplus to purchase Taylor's shares;
5. He believed shareholder approval was not required to comply with Idaho Code § 30-1-6; and
6. He failed to disclose the analysis and research in reaching for his opinions.

Appellant's Brief, pp. 36-37.

(1) Taylor Had Actual Knowledge of the Alleged Concealed Facts Before Final Judgment in *Taylor v. Babbitt*.

This Court has already determined that Taylor had actual knowledge of the facts constituting fraud long before *Taylor v. Babbitt*. *See Taylor v. AIA Services*, 151 Idaho at 565, 566, 261 P.3d at 842, 843. Taylor's present fraud claim is based on an allegedly misleading Opinion Letter that the SRA was legal and Riley's failure to disclose information that would have made the Opinion Letter not misleading. In a classic example of being hoisted upon one's own petard, Taylor raised fraud in *Taylor v. AIA* in an attempt to enforce the illegal contract. In doing so he showed intimate and exquisite knowledge of the factual underpinnings of his present fraud claim dating back as far as 1995. For instance:

- Taylor acknowledged that AIA's balance sheets in 1995 suggested insufficient earned surplus, balance sheets he had access to and should have known about as CEO and majority shareholder;
- Alternatively, Taylor claimed the following facts could be interpreted to show AIA had sufficient earned surplus to redeem his shares in 1995 thereby making a shareholder vote unnecessary (the same information reviewed by Riley and available to Taylor):
  - appraisals from 1995 and 1996 that valued a minority interest in AIA Services at $2 million and $4 million, respectively;
  - a 1994 appraisal valuing the whole company at over $19 million;
  - Taylor's own valuation of the commissions and contractual relationships held by AIA at over $24 million in 1995;
  - AIA's projection of substantial earnings upon redeeming Taylor's shares and redirecting the company; and

- Taylor argued that Judge Brudie failed to consider the "fair market value" of AIA in 1995, the same value that Riley considered in preparing the Opinion Letter.
- Taylor argued that a violation of Idaho Code § 30-1-6 is merely a technical violation and does not render the SRA illegal and unenforceable.

Taylor v. AIA, 151 Idaho at 560, 564, 565, 261 P.3d at 837, 841, 842. These arguments made in support of the fraud exception to illegality in *Taylor v. AIA* mirror the concealed "facts" alleged as the basis for the present fraud claim. Taylor knew the facts long before February 22, 2012.

Taylor's legal arguments in support of the fraud exception to illegality in *Taylor v. AIA* are equally telling of his actual knowledge of the facts constituting the current fraud claim. In that case, Taylor argued that he was fraudulently induced to enter into the SRA by the Opinion Letter, which opined that the Agreement did not violate any laws. *Taylor v. AIA*, 151 Idaho at 566, 261 P.3d at 843. Taylor further argued that the Opinion Letter was intended to mislead and therefore could form the basis of fraud. *Id.* Finally, he argued that the SRA should be enforced given the malfeasance of AIA Services and its attorneys in unlawfully engineering this illegal agreement. *Taylor v. AIA*, 151 Idaho at 567, 261 P.3d at 844. Each of these arguments is merely a different way of alleging his current fraud claim.

This Court also recognized in *Taylor v. Riley* (Permissive Appeal) that Taylor knew and in fact argued, as far back as February 6, 2009, that Riley committed fraud by failing to disclose facts and by issuing a clean Opinion Letter (i.e., one without the reasoning underlying the opinions).[12]

[12] A "clean opinion," or an unqualified opinion, generally states standard exceptions and provides a clear expression of the law on a certain legal question. KELLY A. LOVE, *A Primer on Opinion Letters: Explanations and Analysis*, 9 Transactions: Tenn. J. Bus. L. 67 (2007) (citing to GEORGE

> With respect to the legality of the stock redemption, Mr. Taylor asserted that Messrs. Riley and Turnbow had issued an opinion letter that did not disclose any violation of either Idaho Code §§ 30-1-6 or 30-1-46. Mr. Taylor's response was as follows: 'On August 15, 1995, an opinion letter was issued to Reed Taylor verifying many requirements had been met by AIA Services, including, without limitation, that the purchase of Reed Taylor's shares was a legal transaction and that shareholder approval was obtained. The opinion letter was based upon the knowledge of R.M. Turnbow and Richard Riley. The Opinion Letter makes no reference to any violations of Idaho Code § 30-1-46 or Idaho Code § 30-1-6, but instead merely contains the standard language contained in virtually any opinion letter that the enforceability of the documents could be effected [sic] by bankruptcy or insolvency.

Taylor v. Riley, 157 Idaho at 330, 336 P.l3d at 263. (emphasis added).

This Court established in *Taylor v. AIA* and in the Permissive Appeal that Taylor had sufficient actual knowledge to satisfy the discovery exception to the three year fraud statute of limitation before final judgment in *Taylor v. Babbitt*.

(2) Taylor Had Constructive Knowledge of the Alleged Concealed Facts Before Final Judgment in *Taylor v. Babbitt*.

This Court also established in *Taylor v. AIA* that Taylor had constructive knowledge of the facts constituting his present fraud claim going back as far as 1995. As an additional basis for seeking enforcement of the illegal agreement, Taylor argued that he was ignorant of the facts relating to illegality. *Taylor v. AIA*, 151 Idaho at 565, 261 P.3d at 842. Specifically, Taylor argued that: (1) he was ignorant of the existence of the earned and capital surplus limitations of Idaho Code § 30-1-6, the insufficient surplus, and the absence of a shareholder vote explicitly authorizing use of capital surplus; (2) that he was in no position to understand the circumstances

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W. KUNEY, *The Elements of Contract Drafting with Questions and Clauses for Consideration*, n. 4 at 160 (Thomson West, 2d ed. 2006).

surrounding the SRA; and (3) that AIA and its attorneys were in a better position to understand these matters and were therefore more at fault. *Id.* This Court determined that, if Taylor did not have actual knowledge of these matters, he was not justifiably ignorant of them (and by implication had, at least, constructive knowledge). *Id.* The Court reasoned that Taylor was the CEO, Chairman of the Board and majority shareholder of AIA and nothing suggested he was justifiably ignorant as to the circumstances causing the illegality. *Id.* If Taylor was uninformed as to the financial status of his corporation, this Court determined that was a voluntary choice on his part and was insufficient to make him an innocent party to the agreement. *Id.*

Taylor cannot now claim that he did not know the facts, analysis and reasoning underlying the Opinion Letter until February 22, 2012 because he raised all of them in contesting the illegality of the SRA. Taylor cannot now claim he did not know that Riley believed the Opinion Letter to be correct until February 22, 2012 when Taylor himself argued in 2009 that it was correct. Based on Taylor's position in *Taylor v. AIA*, he cannot now argue he did not know until 2012 that Riley allegedly departed from the clear meaning of the statute because Taylor himself argued in 2009 that departing from the statute was nothing more than a technical error (i.e., not fraud). Taylor cannot now argue he did not know until 2012 that Riley relied upon "fair value" instead of earned surplus because Taylor himself faulted Judge Brudie for failing to consider the fair market value of AIA. Taylor cannot now argue he did not know until 2012 that Riley failed to disclose his belief that AIA had sufficient earned surplus to redeem his shares because Taylor himself asserted numerous arguments that AIA did.

In light of the facts presented and argued in *Taylor v. AIA* in support of the fraud exception to the illegality doctrine, it rings hollow that Taylor did not learn of the facts constituting his present fraud claim until February 22, 2012. Taylor had actual or constructive knowledge of the facts necessary to discover his fraud claim before *Taylor v. Babbitt* was filed. His fraud claim was ripe and could have been brought in the prior litigation.

(3) The Knowledge Necessary to Satisfy Res Judicata is Less Than That Needed for Accrual of the Fraud Claim.

Taylor's alleged lack of knowledge of the "new" facts relating to fraud does not toll the application of res judicata to 2012. This Court has previously examined, in the context of res judicata, what constitutes the degree of knowledge necessary to trigger a party's duty to bring a fraud claim in the first action. The requisite degree of knowledge for application of res judicata is less than required for the discovery exception to the fraud statute of limitation. There need only be knowledge that a potential claim exists, not knowledge of all facts underlying the claim.

In *Magic Valley Radiology, P.A. v. Kolouch*, 123 Idaho 434, 437, 849 P.2d 107, 111 (1993), the Court examined whether the plaintiff had exercised due diligence to discover in a prior action the fraud claim that was the subject of a subsequent action. This Court explained that this was the third lawsuit arising out of a contract dispute. In *Magic Valley I* the theories of breach of contract and tortious conduct were litigated. *Magic Valley II* concerned issues of damages, attorney fees, and the status of security posted on appeal in *Magic Valley I*. *Magic*

Valley III sought to hold individuals liable for the judgment entered in the prior litigation by piercing the corporate veil based on fraud.[13]

Regarding the amount of knowledge needed to trigger res judicata, this Court found that "Magic Valley was on notice in *Magic Valley I* that there might be a basis to pierce the corporate veil of PBS to hold the Kolouchs liable." *Id.*, 123 Idaho at 439, 849 P.2d at 112. Of note, this Court determined that the knowledge needed to trigger res judicata was notice that there might be a basis for a claim or remedy. *Id.* A party need not have perfect knowledge of or certainty that a claim exists or all of the facts constituting the claim before res judicata is triggered. "A party may set forth two or more statements of a claim or defense alternatively or hypothetically. . ." *Taylor v. Riley*, 157 Idaho at 334, 336 P.3d at 267. This is consistent with this Court's holding that the claim in the subsequent lawsuit is still barred even if it is based on different theories of liability or different facts. *Taylor v. Riley*, 157 Idaho at 333, 336 P.3d at 266.

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[13] The Court held in *Magic Valley III* that the subsequent lawsuit arose out of the same transaction as the prior lawsuit, even though the theories of liability and the evidence necessary to prove liability, were different in the subsequent action and dismissed the corporate piercing claim as barred by res judicata. *Magic Valley III*, 123 Idaho at 438-439, 849 P.2d at 111-112. The three Magic Valley cases are not unlike the three cases relevant to the present matter. *Magic Valley I* is similar to *Taylor v. AIA* in that it sought a determination of liability based on an underlying contract. *Magic Valley II* is similar to *Taylor v. Babbitt* in that it arose out of the initial litigation. *Magic Valley III* is similar to the present action in that Taylor seeks to collect damages arising out of the same transaction litigated in the prior litigation and seeks the same damages as previously sought but from a different source and based on an alternative theory of liability.

Believing that there was fraud, knowing that the Opinion Letter opined that the SRA was legal, knowing that the defendants in *Taylor v. AIA* alleged that it was not legal, knowing that the Opinion Letter was clean rather than explained and knowing (or should have known) the facts surrounding the lack of earned surplus and lack of a shareholder vote, Taylor could have pleaded (and did plead) all of his fraud related claims alternatively or hypothetically in *Taylor v. Babbitt*. Taylor was, at a minimum, on notice that there "might" be a basis for fraud before final judgment in *Taylor v. Babbitt* and he should have brought his current fraud claim in that action.

Perhaps in recognition that none of Taylor's claims can escape the application of res judicata, this Court noted:

> . . . The complaint [in *Taylor v. Babbitt*] alleged numerous claims against Mr. Riley, but the issue is not what was the substantial point or essence of the claim. The issue is whether the lawsuit included <u>any claim</u> that arose out of the same transaction or series of transactions as the claim asserted in this case. . . .

Taylor v. Riley, 157 Idaho at 334, 336 P.3d at 267 (underlining added). This Court ultimately held:

> Mr. Taylor's claim<u>s</u> in this lawsuit against Mr. Riley are barred by the judgment entered in favor of Mr. Riley in *Taylor v. Babbitt*.

Id., 157 Idaho at 335, 336 P.3d at 268. (Underlining and bold added.) Taylor's fraud claim is barred by final judgment in *Taylor v. Babbitt* and/or final judgment in *Taylor v. AIA*. The dismissal of the fraud claim should be affirmed.

C. There Are Independent Grounds to Uphold the Dismissal of All of Taylor's Claims.

1. Negligent Misrepresentation Fails on the Merits.

This Court has stated, "[W]e expressly hold that, except in the narrow confines of a professional relationship involving an accountant, the tort of negligent misrepresentation is not recognized in Idaho." *Duffin v. Idaho Corp Improvement Ass'n.*, 126 Idaho 1002, 1010, 895 P.2d 1195, 1203 (1995). *See also Mannos v Moss*, 143 Idaho 927, 155 P.3d 1166 (2007). This Court should once again resist expanding negligent misrepresentation, especially to include attorneys involved in preparing opinion letters addressed to non-clients.

There are no policy or other reasons to expand negligent misrepresentation to include an attorney opinion giver. In the context of whether there is a claim by an opinion recipient against an opinion giver, this Court determined that an attorney can voluntarily assume a duty to a non-client. *Taylor*, 157 Idaho at 339, 336 P.3d at 273. Specifically, this Court ruled with respect to the Opinion Letter at issue here, that Mr. Turnbow owed a duty of care to Taylor because he voluntarily undertook to issue the Opinion Letter stating that Taylor could rely upon it. *Id.* Having recognized a duty of care owed by an opinion giver to a non-client opinion recipient based on an assumed duty, there is no need to expand negligent misrepresentation into this context. Non-client opinion letter recipients can sue for negligence and fraud. There is no need to create yet another avenue for a non-client to sue an attorney.

Negligent misrepresentation by a non-client against an attorney is not a recognized claim. The district court's dismissal of this claim should be affirmed.

2. **Fraud Fails on the Merits.**

a. There is No Requisite Relationship to Support Constructive Fraud.

Taylor cannot establish the requisite relationship between him and Riley (or Hawley Troxell) for purposes of a constructive fraud claim. "An action in constructive fraud exists when there has been a breach of a duty arising from a relationship of trust and confidence, as in a fiduciary duty." *Hines v. Hines*, 129 Idaho 847, 853, 934 P.2d 20, 26 (1997). "Examples of relationships from which the law will impose fiduciary obligations on the parties include when the parties are: members of the same family, partners, attorney and client, executor and beneficiary of an estate, principal and agent, insurer and insured, or close friends." *Mitchell v. Barendregt*, 120 Idaho 837, 844, 820 P.2d 707, 714 (Ct.App. 1991). None of these special relationships exist between Taylor and Riley or Hawley Troxell relating to the Opinion Letter.[14]

[14] Taylor attempts to forge the requisite relationship by claiming that Riley was his personal attorney for his 1987 divorce and certain personal financial transactions prior to leaving Eberle Berlin in 1999. Appellant's Brief, p. 47. Riley was not Taylor's divorce attorney at the time the Opinion Letter was issued. R. 902 (Eberle Berlin's representation of Taylor during his divorce ended in 1991). Regardless, Riley was not Taylor's attorney or in any other position of trust or confidence with respect to the Opinion Letter. In that context, Riley was representing AIA and Taylor had his own personal and independent attorneys. R. 563-564. As this Court has repeatedly held, "'[t]he scope of an attorney's contractual duty to a client is defined by the purposes for which the attorney is retained.'" *Taylor v. Babbitt*, 149 Idaho at 845, 243 P.3d at 661 (quoting *Johnson v. Jones,* 103 Idaho 702, 704, 652 P.2d 650, 652 (1982)). Moreover, "[i]f the attorney agrees to undertake a specific matter, the relationship terminates when that matter has been resolved." *Berry v. McFarland*, 153 Idaho 5, 9, 278 P.3d 407, 411 (2012).

In *Berry*, this Court affirmed the district court's holding that McFarland did not breach a fiduciary duty as an attorney to Jerry Berry. In late 2000 or early 2001, Berry sought legal advice from McFarland about whether he could protect stock from creditors by filing bankruptcy. In 2003, McFarland and co-respondent Karen Zimmerman loaned Berry $100,000 so that he could purchase certain stock, and in 2006 they purchased that stock from Berry for the same price.

Indeed, this Court has already determined that Taylor failed to establish the necessary relationship with Riley and upheld the dismissal of constructive fraud for failure to state a claim. *Taylor v. Babbitt*, 149 Idaho at 846, 243 P.3d at 662. Moreover, this Court's decision in *Taylor v. Riley* (Permissive Appeal) supports the lack of the requisite relationship to support constructive fraud. In that decision, the Court acknowledged a duty owed by an opinion giver to an opinion recipient based on ordinary negligence (an assumed duty). *Taylor v. Riley*, 157 Idaho at 339, 336 P.3d at 272. This Court did not do so based on a relationship of trust and confidence or a fiduciary relationship.

b. Taylor Cannot Prove the Elements of Fraud.

(1) There Are No Statements of Fact in the Opinion Letter.

Taylor's fraud allegations are based, in part, on alleged representations in the Opinion Letter that the transaction did not violate the law. However, this Court has already determined that the Opinion Letter sets forth an opinion based on interpretations of law and not a statement of fact and, therefore, cannot form the basis for fraud.

> [The Opinion Letter] expressed an opinion that no statute was violated by the Stock Redemption Agreement, an opinion currently postulated to the Court by plaintiff. Such an opinion was no more a statement of fact when expressed by

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Berry contended that McFarland breached a fiduciary duty arising from his attorney-client relationship with Berry when he purchased the stock from Berry in 2006. The Court rejected this argument because there was insufficient evidence to show a continuing attorney-client relationship from 2000 or 2001 until the stock purchase in 2006. The Court concluded that McFarland could not have breached a fiduciary duty because there was no attorney-client relationship when McFarland purchased the stock in 2006. Applying *Berry* here, any breach of fiduciary duty and constructive fraud claim must fail because there was no attorney-client relationship or relationship of trust and confidence between Riley and Taylor in the context of the Opinion Letter.

> corporate counsel in 1995 than it is now when asserted by plaintiff. It is simply an opinion based on one's interpretation of law and cannot form the basis for a fraud claim.

Taylor v. AIA, 151 Idaho at 566, 261 P.3d at 843. Under either fraud or constructive fraud, opinions and predictions of future events, as opposed to representations of fact, cannot form the basis for fraud. *Country Cove Development, Inc. v. May*, 143 Idaho 595, 601, 150 P.3d 288, 294 (2006) (opinions and predictions cannot form the basis of a fraud claim because they do not speak to matters of fact); *Thomas v. Med Center Physicians, P.A.*, 138 Idaho 200, 207, 61 P.3d 557, 564 (2002) (an action for fraud or misrepresentation will not lie for statements of future events). *Sharp v. Idaho Investment Corp.*, 95 Idaho 113, 122, 504 P.2d 386, 395 (1972) ("[A] representation consisting of [a] promise or a statement as to a future event will not serve as a basis for fraud, even though it was made under circumstances as to knowledge and belief which would give rise to an action for fraud had it related to an existing or past fact.").

Any alleged opinion regarding the future enforceability of the SRA cannot form the basis for fraud. It does not speak to a matter of existing or past fact. The opinion regarding the legality of the SRA is merely a prediction of what the highest Court would say. *See* TriBar Opinion Committee ("TRIBAR II"), *Third-Party "Closing" Opinions*, 53 Bus. Law. 591, 595-596 (1998) ("An opinion on a legal issue provides the opinion recipient with the opinion giver's professional judgment about how the highest court of the jurisdiction whose law is being addressed would appropriately resolve the issues covered by the opinion on the date of the opinion letter.") Such predictions do not, and cannot, constitute fraud. The most that can be said is that a Court subsequently disagreed with opinions regarding enforceability of the 1995 SRA.

Importantly, that court found the opinion to be "incorrect" and specifically found that the opinion was not fraudulent. R. 4912. Simply by virtue of being one of the preparers of the 1995 Opinion Letter, Riley did not thereby become the guarantor of his client's ability or willingness to perform or of how a future court would rule on the legality of the SRA. Taylor cannot prove that the Opinion Letter made actionable statements of fact; accordingly both fraud and constructive fraud fail as to the first element of fraud.

In an effort to evade the *Taylor v. AIA* ruling that the Opinion Letter expresses opinions and not statements of fact, Taylor now claims that Riley fraudulently concealed "facts" that would have made the Opinion Letter not misleading, concealed that he felt the Opinion Letter was correct, and failed to provide the reasoning behind his opinions. (Appellant's Brief, p. 27.) The allegedly concealed facts are not "facts"; Riley's belief that the Opinion Letter was true, accurate or correct is an opinion, not a fact; and choosing whether to issue a clean versus reasoned opinion is not fraud.

(a) The Alleged Concealments are Not of Facts.

In summary, Taylor argues that Riley (and Hawley Troxell) concealed the following "facts" until February 2012:

1. The Opinion Letter was and is believed by Riley to be a correct, fair and objective opinion;
2. Riley concluded that AIA could not later disavow its obligations to Reed Taylor;
3. Riley found no Idaho cases addressing the statutory restrictions on distributions to shareholders;
4. Riley researched and found no explanation of "earned surplus";
5. Riley concluded that the corporation had sufficient net assets to satisfy statutory restrictions on redemption as construed in light of RMBCA 6.40;

6. RMBCA 6.40 expressly provides that the board of directors may determine that a distribution is not prohibited on the basis of fair value and other methods of valuation;
7. Using a "fair value" of AIA assets complied with statutory requirements; and
8. Riley opined that a shareholder vote authorizing the use of capital surplus was not necessary to comply with the statute.

Appellant's Brief, p. 28. None of these are facts. They are beliefs or conclusions reflecting an exercise of professional judgment. They describe research done to reach the conclusions, beliefs and opinions. They describe the legal analysis completed to come to these conclusions, beliefs and opinions. These are the underlying information upon which the opinions are based. Because they are not facts, none of these can form the basis for fraud, whether it is characterized as fraudulent inducement, constructive fraud or fraudulent concealment.

(b) Whether or Not an Opinion Giver Believes the Opinion to be Correct is Not an Actionable Representation of Fact.

Taylor claims that Riley (with Hawley Troxell's assistance) failed to disclose until February 2012 that Riley believed the Opinion Letter to be correct. Riley's belief that the Opinion Letter was correct is not a fact, nor is it necessary to make it not misleading. It is a belief or opinion, neither of which can form the basis for fraud whether it is labeled fraudulent inducement, constructive fraud or fraudulent concealment.

(c) The Alleged Concealment of the Analysis or Reasoning Behind the Opinion Letter Cannot Form the Basis for Fraud.

Taylor claims that Riley concealed from him the basis and reasoning necessary to make the Opinion Letter not misleading. Taylor argues that the opinions should have been reasoned opinions rather than clean opinions. A clean opinion does not disclose the reasoning, research or

analysis used to reach the opinions. This "undisclosed information" is merely the basis of the opinions given, not representations or omissions of fact. Whether to issue a clean or reasoned opinion is a matter of professional judgment. TRIBAR II, 53 Bus. Law. at 607 ("A reasoned (or 'explained') opinion is typically rendered when, in the view of the opinion giver, the opinion's conclusions should not be stated apart from its underlying reasoning . . ."). While incorrect opinions and underlying reasoning, research and analysis may be a basis for a negligence claim, failure to disclose the reasoning does not transform the negligence into fraud. Choosing to issue a clean opinion cannot be the basis for fraud. Therefore, "concealing" the reasoning cannot be the basis for fraud.

(2) Neither the Opinions Nor the Allegedly Concealed Facts and Reasoning are False.

An opinion giver is not liable merely for being wrong. *Lucas v. Hamm*, 364 P.2d 685, 689 (Cal. 1961). The recipient of an opinion letter has no claim for negligence or fraud simply because the opinions given prove to be incorrect. Donald W. Glazer, *et al., Glazer and FitzGibbon on Legal Opinions: Drafting, Interpreting and Supporting Closing Opinions in Business Transactions* §§ 1.1, 1.2.1 (3d ed). Legal opinions are expressions of professional judgment, not guarantees that a court will reach the same conclusion as the opinion giver. *Washington Electric Co-Op, Inc. v. Massachusetts Municipal Wholesale Electric Co.*, 894 F.Supp. 777, 790 (D. Ver. 1995).

On June 17, 2009, nearly 14 years after the Opinion Letter was issued, the district court determined that the Opinion Letter was "incorrect." R. 4912. This finding did not make the

Opinion Letter fraudulent or even negligent. In fact, the district court and this Court determined it was not fraudulent. *Taylor v. AIA*, 151 Idaho at 566, 261 P.3d at 843. If an opinion is incorrect, then presumably so is the underlying reasoning, research and analysis. Disclosing that information would not change the outcome; and failing to disclose it is not fraud.

(3) Riley Did Not Know Any of His Opinions or the Underlying Reasoning, Research or Analysis Were False.

Being incorrect does not make the opinions false or fraudulent. *Id.* When the Opinion Letter was issued, Riley had no knowledge or belief that it was incorrect, let alone false. R. 2936. As Taylor states, even in February 2012 Riley believed, in 1995, that the opinions and underlying reasoning, research and analysis were correct. Appellant's Brief, p. 28.

(4) Riley Did Not Intend to Induce Reliance by Taylor on Any False Statements.

The speaker's intent to induce reliance has already been decided against Taylor. In *Taylor v. AIA*, this Court rejected Taylor's argument that he had been fraudulently induced by AIA or its attorneys to enter into the SRA by the Opinion Letter. *Taylor v. AIA*, 151 Idaho at 566, 261 P.3d at 843. Indeed, this Court determined that there was nothing in the record suggesting that anyone intended to mislead Taylor with the Opinion Letter. *Id.*

(5) Taylor was Not Ignorant of Any Falsity of Any Allegedly Concealed Facts and He Had No Right to Rely on Them.

With respect to other elements of fraud – the hearer's ignorance of the falsity of the statement of fact and reliance by the hearer – this Court has already ruled that these elements do not exist. This Court determined that Taylor was not justifiably ignorant as to the circumstances

causing the illegality – the insufficient earned surplus and absence of a shareholder vote – because he was CEO and Chairman of the Board, as well as majority shareholder of AIA. *Taylor v. AIA*, 151 Idaho at 565-566, 261 P.3d at 842-843. This Court affirmed the district court's ruling that:

> This is not a case where the parties to the agreement are *in pari delicto* . . . If Reed Taylor was uninformed as to the financial status of his corporation, that was a voluntary choice on his part and is insufficient to make him an innocent party to the agreement.

Id., 151 Idaho at 566, 261 P.3d at 843.

Taylor cannot prove all of the elements of fraud and this claim fails on the merits.

c. Neither Riley Nor Hawley Troxell Owed Any Duty to Taylor After Issuance of the Opinion Letter.

Taylor seeks to create a new and different fraud claim and extend the scope of opinion-giver duties owed based on an alleged continuing duty to disclose to Taylor the facts, bases and reasoning necessary to clarify the allegedly misleading Opinion Letter; which duty allegedly continued from issuance of the Opinion Letter in 1995 until February 2012. Appellant's Brief, p. 36. Taylor argues that Riley and Hawley Troxell breached this continuing duty by refusing in *Taylor v. AIA* or *Taylor v. Babbitt* to provide Riley for deposition, refusing to respond to written discovery, and refusing to support his efforts to prove the SRA was legal. *Id.*[15] Taylor fails to

[15] Taylor either failed to pursue discovery efforts or the district courts in *Taylor v. AIA, Taylor v. Babbitt* and *Taylor v. Riley* denied Taylor's discovery efforts, entered protective orders against those discovery efforts or stayed the action, thereby ratifying any action taken with respect to discovery. R. 2734, 2735, 3529. It cannot be fraud or breach of a fiduciary duty to do that which is sanctioned by a court.

provide any legal authority or factual basis for this continuing duty. Indeed, no such duty exists; and the Opinion Letter itself disclaims assumption of any such duty.

There is no continuing duty when the duty owed is an assumed duty and the duty assumed is limited. "Although a person can assume a duty to act on a particular occasion, the duty is limited to the discrete episode in which the aid is rendered." *Udy v. Custer County*, 136 Idaho 386, 389, 34 P.3d 1069, 1072 (2001) (citations omitted). "In other words, past voluntary acts do not entitle the benefited party to expect assistance on future occasions, at least in the absence of an express promise that future assistance will be forthcoming." *Id.*, 136 Idaho at 390, 34 P.3d at 1073 (citations omitted). *See also Stoddart v. Pocatello School District # 25*, 149 Idaho 679, 687, 239 P.3d 784, 792 (2010) ("To the extent that there was an assumption of a duty by way of the investigation in 2004, that investigation concerned the threat by Draper to commit a school shooting then, with C.N. The School District did not assume an ongoing duty to monitor Draper's potential involvement in a future school shooting, much less a crime that might be committed away from school grounds.")

> "When a party assumes a duty by voluntarily performing an act that the party had no duty to perform, the duty that arises is limited to the duty actually assumed." *Martin v. Twin Falls School Dist. No. 411*, 138 Idaho 146, 150, 59 P.3d 317, 321 (2002). Thus, merely because a party acts once does not mean that party is forever duty-bound to act in a similar fashion. A beach-goer may assume a duty to rescue a drowning swimmer in a non-negligent manner by undertaking to do so, but that same beach-goer has no obligation to rescue anyone else. In *Martin*, the school district was not required to post crossing guards at every school crossing even though it had provided crossing guards at certain crossings. Thus, although a party may assume a duty by undertaking an act, that duty is limited to the scope of the undertaking.

Beers v. Corporation of President of Church of Jesus Christ of Latter-Day Saints, 155 Idaho 680, 688, 316 P.3d 92, 100 (2013).

The only duty assumed by Riley or any other attorney involved with the Opinion Letter was an assumed duty to issue a non-negligent Opinion Letter. *Taylor v. Riley*, 157 Idaho at 339, 336 P.3d at 272. There was no assumption of any other duty, fiduciary or otherwise. In fact, the Opinion Letter expressly disclaims assumption of any duty after the Opinion Letter was issued:

> We assume no responsibility for updating this opinion to take into account any event, action, interpretation or change of law occurring subsequently to the date hereof that may affect the validity of any of the opinions expressed herein.

R. 827. There was no assumed duty to disclose the facts, reasoning or analysis underlying the Opinion Letter after it was issued. There was no duty assumed or owed to take or refrain from taking any action for the benefit of Taylor. There was no duty assumed or owed to make Riley available for deposition, respond to written discovery or assist Taylor in any of his numerous lawsuits. None of Taylor's claims can be based on an alleged breach of any duty that supposedly arose after the 1995 Opinion Letter was issued.

Regardless, Taylor is barred by res judicata and collateral estoppel from relitigating any claim based on a continuing duty. Taylor alleged in the prior lawsuit (*Taylor v. Babbitt*) that Riley owed a continuing duty to him. In Taylor's Motion to Amend the Complaint in that action, Taylor alleged "defendant Riley owes Reed Taylor special duties by and through an opinion letter. Riley breached his duties when he asserted that the transaction was illegal." R. 470. Taylor thereby alleged a continuing duty not to take positions contrary to the Opinion Letter. R. 47.

These prior allegations of a breach of a continuing duty owed to Taylor were based on Riley and Hawley Troxell's litigation conduct in *Taylor v. Babbitt* (an alleged duty not to take inconsistent positions). Taylor is now arguing in the present suit that Riley and Hawley Troxell breached a continuing duty based on different litigation conduct (failing to make Riley available for deposition, failing to respond to written discovery and failing to assist in avoiding the illegality of the SRA). Simply alleging different facts or a different legal theory does not save this continuing duty basis for his present claims from the bar of res judicata or collateral estoppel.

Taylor was fully aware, while *Taylor v. Babbitt* was pending, of the facts necessary to raise these newest claims of breach of continuing duty owed to Taylor. Taylor could have brought these claims in the prior litigation and his failure to do so bars him from doing so in the present litigation.

3. Breach of Fiduciary Duty Fails on the Merits.

The same reasons discussed above relating to Taylor's failure to establish the requisite relationship for constructive fraud applies equally to breach of fiduciary duty. This Court ruled in *Taylor v. Babbitt* that Taylor failed to establish that Riley owed him a fiduciary duty. *Taylor v. Babbitt*, 149 Idaho at 845, 243 P.3d at 661. Further, this Court found in *Taylor v. Riley* (Permissive Appeal) that only an ordinary duty of care was owed by Eberle Berlin to Taylor. *Taylor v. Riley*, 157 Idaho at 339, 336 P.3d at 272. At most, this would be the only duty Riley would owe. As the district court reasoned, the mere fact that the law allows a negligence action to be filed against an attorney does not mean the relationship is expanded to a fiduciary one. R.

1689. An opinion giver has a duty to act without negligence; but issuing an Opinion Letter does not create any duty beyond that. *Id.* This holding and analysis should be affirmed.

Moreover, "[a]ttorneys owe fundamental duties to their clients. Among the most important of these duties are the duties of zealous representation and loyalty." *Heinze v. Bauer*, 145 Idaho 232, 238, 178 P.3d 597, 603 (2008). Creating a fiduciary relationship to a non-client in the context of an attorney providing legal services to a client would create a conflict of interest between an attorney's duty to his client and the attorney's duty to the third party non-client, thereby limiting the attorney's ability to zealously represent his or her client. *Barcello v. Elliott*, 923 S.W.2.d 975, 580 (Texas 996). In *Garcia v. Rodey, Dickason, Sloan, Akin & Robb*, 750 P.2d 118 (1988), the court rejected plaintiff's attempt to allege causes of action for constructive fraud and other torts based on counsel's statements upon which a litigation adversary allegedly relied to his detriment. The court found that imposition of the requisite legal or equitable duty to the plaintiff "would be contrary to an attorney's duty to represent his client and pursue his client's interests with undivided loyalty." *Id.*, 750 P.2d at 124. Those duties would be irrevocably compromised if attorneys were required to temper their representation but take into account the economic or other interests of third parties. As this Court held in *Taylor v. Babbitt*, "[I]t is incredulous that Reed would attempt to assert that attorneys hired by the AIA Entities, to fight off Reed's litigation against those entities, were being retained for Reed's benefit." *Taylor v. Babbitt,* 149 Idaho at 845, 243 P.3d at 661. Imposing fiduciary duties or expanding constructive fraud to non-clients would give rise to increased lawsuits and cause attorneys to practice in a

manner calculated to protect themselves rather than advance the interests of their clients. The dismissal of breach of fiduciary duty should be affirmed.

4. All Claims Alleged Against Hawley Troxell Fail as a Matter of Law.

In the present action, Taylor alleges Hawley Troxell is vicariously liable for the acts and/or omissions of Riley. R. 25. The district court dismissed all claims against Hawley Troxell relating to the issuance of the Opinion Letter on the undisputed grounds that Riley was not an employee, agent or principal of Hawley Troxell at the time the Opinion Letter was issued. R. 1680-81. Vicarious liability cannot apply to acts or omissions which occur when there is no relationship whatsoever between the parties. *Id.* Taylor concedes that Hawley Troxell is not vicariously liable for Riley's acts at the time of the Opinion Letter. Appellant's Brief, p. 48.

The district court also dismissed all claims against Hawley Troxell grounded on taking a litigation position in *Taylor v. AIA* contrary to the Opinion Letter as barred by res judicata. R. 1689. For the reasons discussed *supra*, all claims alleged against Riley are barred by the final judgments in *Taylor v. AIA* and *Taylor v. Babbitt* and, therefore, all vicarious liability claims against Hawley Troxell are barred.

Taylor now asks this Court to reverse the dismissal of the vicarious liability claims against Hawley Troxell based on Riley's breaches of continuing duties owed to Taylor to disclose facts, bases and reasoning to make the Opinion Letter not misleading during the course of *Taylor v. AIA*, especially because Hawley Troxell took affirmative action to prevent Taylor from getting this information. Appellant's Brief, p. 48. As discussed above, this new vicarious liability theory also fails.

D. The District Court Did Not Abuse Its Discretion Regarding the Amount of the Attorney Fees Awards.

On appeal, Taylor does not seek to overturn the district court's awards of attorney fees against him (unless he prevails on appeal). He appeals the amount of attorney fees awarded. The district court already significantly reduced the amount of the attorney fees sought. R. 5824. Riley sought an award of attorney fees in the amount of $302,328.75. R. 5070. The district court reduced that amount to $175,000.00. R. 5822-24. Hawley Troxell sought attorney fees in the amount of $40,243.75. R. 4214. The district court awarded $28,750.00. R. 5821-22. Taylor seeks a further reduction of the award of attorney fees. Given the abuse of discretion standard and the prior substantial reduction in the amount of attorney fees awarded, the amount awarded should be affirmed.

Taylor cannot show that the district court awarded fees that "included a substantial amount of fees that were not 'reasonably incurred' by Riley or Hawley Troxell . . . ." Appellant's Brief, p. 50. Taylor cannot show that the district court's reduction did not already reduce or deny attorney fees allegedly not reasonably incurred. Unable to make this showing, Taylor cannot show that the district court abused its discretion in fixing the amount of attorney fees awarded.

Nor can Taylor show that the amount awarded included attorney fees incurred defending against the Consumer Protection Act claim. The district court expressly declined to award fees under this statute. R. 5823.

Taylor also claims the district court abused its discretion by apportioning attorney fees 50/50 between Riley and Hawley Troxell for that period of time before Hawley Troxell was dismissed. Appellant's Brief, p. 52. There was no abuse of discretion in apportioning in this manner. Taylor claimed that Hawley Troxell was vicariously liable for Riley's actions. The defense of the claims against Riley inured to the benefit of the defense of Hawley Troxell. Regardless, Taylor suffered no prejudice or harm by a 50/50 apportionment. The district court could have apportioned attorney fees in a different manner (i.e., 75/25 or 90/10) but Taylor would still have paid the same total amount of attorney fees.

IV. CONCLUSION

Riley and Hawley Troxell request that this Court affirm the district court's dismissal of all claims against them, affirm the award of attorney fees by the district court and award attorney fees on appeal.

DATED this 3 day of January, 2017.

ELAM & BURKE, P.A.

By: _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3 day of January, 2017, I caused a true and correct copy of the foregoing document to be served as follows:

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